No. 404

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JOHN F. DAVIS, CL

In the Supreme Court of the United States

OCTOBER TERM, 1965

UNITED STATES OF AMERICA,

Appellant,

vs.

PABST BREWING COMPANY, SCHENLEY INDUSTRIES, INC., THE VAL CORPORATION,

Appellees.

On Appeal from the United States District Court for the Eastern District of Wisconsin

OBJECTIONS AND MEMORANDUM OF PABST BREWING COMPANY OPPOSING "MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE" OF BREWERS' ASSOCIATION OF AMERICA

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OBJECTIONS OF PABST BREWING COMPANY TO MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE OF BREWERS' ASSOCIATION OF AMERICA

Pabst Brewing Company, appellee, objects to the motion for leave to file a brief *amicus curiae* of Brewers' Association of America presented herein on March 10, 1966, and moves that the Court enter an order denying said motion on the grounds that it has not been filed in compliance

with the Rules of this Court[1] and would serve no useful purpose in this appeal.

In support of its objections, Pabst Brewing Company (hereinafter referred to as "Pabst") informs the Court as follows:

1. This is a direct appeal from a final judgment of dismissal by the district court, entered October 13, 1964, sustaining Pabst's motion to dismiss the government's complaint. The motion was filed at the close of the plaintiff's case on January 28, 1964, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. The district court held that the government had failed to sustain its burden of proving that the Pabst acquisition of the assets and business of Blatz Brewing Company ("Blatz") from Schenley Industries, Inc., in July of 1958 was in violation of Section 7 of the Clayton Act. Notice of Appeal was filed on December 11, 1964, and probable jurisdiction was noted on November 8, 1965. The government's brief on the merits was timely filed on March 10, 1966; the Pabst brief on the merits will be due on April 13, 1966, with oral argument to follow during the April term of this Court.

2. Consent to the filing of a brief as *amicus curiae* was requested by counsel for Brewers' Association of America (hereinafter referred to as "applicant") but was refused by counsel for Pabst which was confirmed by letter on February 14, 1966. This Court's Rule 42(3) provides that when consent to filing of a brief is refused, "a motion for leave to file may timely be presented to the court." Rule 42(2) requires that the brief of an *amicus curiae* on the merits must be presented within the time allowed for the filing of the brief of the party supported which contemplates that

[1] The relevant rules are set out in Appendix A hereto.

a motion for leave to file must thus be made sufficiently in advance of the time for the filing of the brief of the party supported to permit a disposition of the motion before the brief is due. In this case, the government's brief was due on March 10, 1966, and the motion for leave to file the brief *amicus curiae* should have been submitted at least twenty days prior thereto thus allowing sufficient time for filing of this opposition to the motion under Rule 35(4). Applicant made no attempt to obtain the consent of Pabst prior to February 14, 1966, and no motion for leave to file was made until the day of the actual filing of the government's brief. Since all but one of the 89 members of the applicant association were interviewed by government representatives and 19 were actually subpoenaed as government witnesses to appear at the trial, the association and its counsel were aware of the existence of this litigation, the decision of the trial court, and all subsequent steps leading to the perfection of this appeal. Jurisdiction having been noted more than four months ago, the applicant had adequate time within which to file its motion and have it determined well in advance of the deadline for filing its brief. The hardship imposed upon Pabst in this case suggests the reason for the rule. Coming near the end of the term where no extensions of time are ordinarily granted, Pabst will not know if the motion is sustained until too late to prepare and submit a brief in opposition to the *amicus* brief. At the same time Pabst must be and is preparing a brief in opposition to the government's brief on the merits. Having failed to exercise any diligence in this matter which could have prevented this hardship and simplified these proceedings, applicant's motion should be denied as not timely filed.

3. Rule 42(3) requires that the motion for leave to file shall state the nature of applicant's interest and "set forth facts or questions of law that have not been,

or reasons for believing that they will not adequately be, presented by the parties and their relevancy to the disposition of the case." Applicant's two page motion asserts the nature of the applicant's interest in the litigation, but states nothing as to what "facts or questions of law" have not been presented, their relevancy, or why any questions of fact or law will not be adequately presented by the Solicitor General as counsel for the United States. The material in the brief attached to applicant's motion, leaving aside the many errors and inaccuracies therein contained, is almost entirely outside the record and thus completely irrelevant to determining whether the trial court erred in dismissing the complaint. Nor is there any reason in fact, whether or not set forth in the motion, for believing that the Solicitor General cannot adequately present all relevant facts and questions involved to this Court. Applicant's intervention will serve no useful purpose and its motion for leave to file a brief *amicus curiae* should be denied.

4. Applicant's brief will serve no useful purpose in this appeal and is entirely irrelevant to the sole issue; *viz.*, did the trial court err in sustaining the Pabst motion to dismiss on the basis of the record below. Based almost completely on alleged facts not in the record below, applicant's brief and its contents are irrelevant, incomplete and inaccurate:

(a) Applicant's brief consists of forty pages of text and thirteen exhibits and purports to represent the interests and viewpoint of the "smaller brewers of the nation" and particularly "twenty brewers in Wisconsin" who are alleged to be directly affected by the merger of Pabst and Blatz. At the trial below,

government counsel decided shortly before trial not to call as witnesses eight Wisconsin and 11 other brewers who were listed as members of applicant's Association in Exhibit 1 attached to the brief. In fact, no witnesses were called and the government presented no testimony of any kind. Applicant's brief now attempts to introduce in this Court the testimony of its members through the arguments and assertions of its counsel which are completely unverified and untested by cross-examination and entirely outside the record. Such procedure is unfair to the trial court and contrary to established appellate principles of this Court.

(b) Applicant's Exhibits 2 through 13 on which many of the arguments in the text are based contain statistical material alleged to represent sales of beer from 1962 to 1965 by individual brewers in the United States as a whole, in Wisconsin, and in Michigan. By agreed pretrial order, no evidence was offered or admitted below concerning events occurring after December 31, 1961 (R. 114) and the government's case was concluded on January 28, 1964 before the period of the statistics for 1964 and 1965. Accordingly, none of this material was before the trial court and is completely irrelevant to this appeal. In addition, the information set forth in the exhibits is incomplete, inaccurate and misleading.

Because there will be insufficient time for Pabst to answer applicant's brief, should the Court permit it to be filed, Pabst is submitting a short memorandum herewith pointing out some of the more obvious deficiencies in said brief in more detail than outlined above.

Since the motion was not timely filed nor in compliance with other requirements of Rule 42 and for reasons set forth above and in said memorandum, Pabst respectfully requests that this Court enter an order denying the motion by Brewers' Association of America for leave to file a brief as *amicus curiae* in support of the government.

DATED: March 30, 1966.

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APPENDIX A

Rule 42 of the Rules of this Court provides in pertinent part as follows:

> "2. A brief of an amicus curiae in cases before the court on the merits may be filed only after the order of the court or when accompanied by written consent of all parties to the case and presented within the time allowed for the filing of the brief of the party supported.
>
> "3. When consent to the filing of a brief of an amicus curiae is refused by a party to the case, a motion for leave to file may timely be presented to the court. It shall concisely state the nature of the applicant's interest, set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case; and it shall in no event exceed five printed pages in length. A party served with such motion may seasonably file an objection concisely stating the reasons for withholding consent.
>
> "5. All briefs, motions, and responses, filed under this rule shall be printed; shall comply with the applicable provisions of Rules 35, 39, and 40 . . . ."

Rule 35 of the Rules of this Court provides in pertinent part:

> "4. Unless a different time for the filing of a brief in opposition is specifically authorized elsewhere in these rules, motions submitted in printed form will normally be held by the clerk for twenty days to permit the filing of forty printed copies of a brief in opposition, after which the motion and brief will be distributed to the court . . . ."

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MEMORANDUM IN SUPPORT OF OBJECTIONS OF PABST BREWING COMPANY TO "MOTION FOR LEAVE TO FILE AND BRIEF AMICUS CURIAE" OF BREWERS' ASSOCIATION OF AMERICA

INTRODUCTION

This memorandum is submitted in support of the Pabst objections to the motion of Brewers' Association of America for leave to file a brief *amicus curiae* in support of appellant with the request that it be considered the Pabst answer to the brief attached to said motion if its filing should be permitted.

QUESTION PRESENTED

Should this Court grant the motion of Brewers' Association of America for leave to file a brief *amicus curiae* in support of the government when the brief attached to the motion is based on alleged matters which were never presented to the trial court and are also unverified, incomplete and inaccurate?

STATEMENT

The Pabst[1] acquisition of the assets and business of Blatz was made in July, 1958, after Pabst sales had declined almost 50% during the preceding six years (F.15, R.461). The complaint charged that the acquisition may have the effect of substantially lessening competition or tending to create a monopoly in the production and sale of beer in the United States, in the area comprising the three states of Wisconsin, Illinois, and Michigan, and in the state of Wisconsin alone (R. 25-26). At the time of the acquisition, Pabst ranked 11th in the sale of beer by breweries in the United States, accounting for approximately 2.67% of national beer sales, while Blatz ranked 13th and accounted for 2.04% (F.16, R.461-462).

The opinion of the court granting Pabst's motion to dismiss filed at the close of plaintiff's case pursuant to Rule 41(b) of the Federal Rules of Civil Procedure on

[1] Throughout this memorandum, the appellee Pabst Brewing Company is referred to as "Pabst"; the Brewers' Association of America is called "applicant" while Blatz Brewing Company whose assets and business Pabst acquired from appellee Schenley Industries, Inc., is denoted as "Blatz." References are to the printed record (R. .....), specific findings of the trial court (F. .....), the government brief on the merits (G.B. .....) and the applicant's brief (A.B. .....).

the ground that the plaintiff had shown no right to relief is reported at 233 F.Supp. 475 and reprinted here (R. 422-455). The court also made detailed findings of fact and conclusions of law reprinted at R.456-480.

Prior to trial, 88 of the 89 alleged members of the applicant listed in Exhibit 1 to its brief were interviewed by representatives of the government (R.64-80) and trial subpoenas were issued for 19 of them (R. 55-59). Pursuant to agreed pretrial order, each of these 19 subpoenaed witnesses furnished at Milwaukee, Wisconsin, for examination by counsel for both sides prior to trial (R. 10-16) either an affidavit or documents (R. 100-102) concerning its production and sales of beer and the profit and losses therefrom. However, shortly before the trial, the government notified the court that no witnesses would be called (R. 126) and none of the affidavits or other documents furnished by these witnesses (R.12-17) was offered in evidence by the government (R. 110). The government's evidence was completely documentary, primarily statistical evidence except for a few minor excerpts from depositions (F.58, R.479).

The court held that the plaintiff had failed to meet its burden of proving that either Wisconsin, or the combination of the three-state area of Illinois, Wisconsin, and Michigan, was a relevant section of the country within the meaning of Section 7 of the Clayton Act and that it had failed to meet its burden of proving that in the continental United States, the stipulated relevant market, the effect of the acquisition of Blatz by Pabst may be substantially to lessen competition or tend to create a monopoly in the beer industry, the stipulated line of commerce (R. 480).

Applicant's brief consists of 40 pages of arguments and 14 pages of exhibits. The text material roams broadly over all aspects of the beer industry, uninhibitedly espousing economic and legal theories and arguments without foundation either in or outside the record. The subjects vary from such economic matters as what the brewing industry is and how it operates to the legal theory of how the merger has affected the status of competition in the state of Michigan which is not even alleged to be a relevant geographic market. Applicant rarely cites the record below, but does not hesitate to rely on material completely outside the record such as questionnaires mailed to its members (A.B.19), magazine articles (A.B.16-17), and other similar sources (A.B.15-16), the accuracy of which has never been tested under oath or by cross-examination.

Exhibits 2 through 13 attached to the brief purport to show sales of leading brewers in the United States as a whole for the years 1962 through 1965 (Exhibits 2-5); sales of individual Wisconsin brewers for the same years (Exhibits 6-9); and sales of beer in Michigan by all firms selling over 5,000 barrels in the same years (Exhibits 10-13). No such information is offered with respect to Illinois, the third state in the alleged three-state market area. Nor is any information furnished as to sales in Wisconsin by 25 breweries located outside the state but who sold 25% of the beer consumed in the state in 1961 (R. 216). None of the 1962-1965 material was in the record below; an agreed pretrial order limited evidence to acts or occurrences prior to December 31, 1961 (R. 114) and the government completed its case on January 28, 1964 before the information in some of applicant's exhibits even existed.

Much of the argument in applicant's brief is based on these 1962 to 1965 outside-the-record and unverified and untested exhibits, and the text even contains statements contrary to much of the statistical material in these exhibits. For example, at amicus brief page 27, a tabulation is set forth purporting to demonstrate that "the sales of the other Wisconsin brewers consistently decline" when Pabst sales increase (A.B.26). Headed "Decline in Sales of Local Wisconsin Brewers" the tabulation conveniently does not include Huber Brewing Company, a small Wisconsin brewer, whose sales have increased from 1962 to 1965 according to applicant's Exhibits 6 and 9 from 66,671 barrels to 111,687 barrels. Nor does it include the figures from Exhibits 6 and 9 showing increases in sales by Wisconsin breweries other than Pabst, such as Heileman, Schlitz and Miller and no figures at all are shown for the out-of-state brewers selling in Wisconsin. Additional examples of similar misstatements are included in the argument (*infra*, pp. 10-11).

Other arguments in the brief are mainly statements or assertions as to how small brewers operate (A.B. 13-14), the nature of their sales and distribution activities (A.B.14-16), admissions of their inefficiencies (A.B. 22-23), their views and opinions as to the effect of the Pabst-Blatz merger on competition (A.B.24-34) and the past and future of the beer industry in general (A.B.9-14). These are all matters which might have been covered by testimony from the witness stand either by these brewers themselves or by some experts in the field. These arguments of applicant's counsel are not substitutes for record testimony, nor should they be confused with the actual facts as they exist in the beer industry.

ARGUMENT

APPLICANT'S BRIEF WILL SERVE NO USEFUL PURPOSE IN THIS APPEAL AND ITS CONTENTS ARE IRRELEVANT, INCOMPLETE AND UNRELIABLE.

A. Counsel's theories, arguments and assertions are no substitute for record testimony. Applicant's brief attempts to establish by bland assertion many theories concerning the beer industry which, if true, should have been the subject of testimony in the lower court. Members of the applicant association, other brewers, distributors, or persons connected with the beer industry, as well as economists and other experts are the proper persons to furnish information to the trial court from the witness stand concerning matters which are argued in applicant's brief such as the nature of competition in the brewing industry (A.B. 9), competitive problems of the brewer in distribution (A.B.14) and in advertising (A.B.16), ease of entry into the brewing industry (A.B.19), the relative efficiencies of the various size brewers (A.B.22) and the status of competition in the beer industry in Wisconsin (A.B.26), Michigan (A.B.31), Illinois (A.B.34) or the United States (A.B.24).

However there was no testimony on these matters in the record below and in any event the assertions and arguments of applicant's counsel here are so inconsistent, inaccurate and unreliable as to be of no help to the Court (See *infra*, pp. 9-11). But there are also additional reasons for questioning the reliability, if not the credibility,

of the brief's arguments. Applicant purports to represent the "small brewers of the nation" and particularly the 20 brewers located in Wisconsin who are also members of the association. (A.B.2). Yet as noted above, for reasons which have never been clearly stated, in a last minute decision on the very eve of trial the government decided not to call these brewers or any other witnesses below (R.126). Thus, the testimony of these persons, now in the form of assertions and arguments of their counsel, which this Court is urged to accept as true, was deemed either so unimportant or so unreliable that it was not presented to the trial court and subjected to cross-examination under oath. Likewise, the affidavits and documents returned in response to the subpoenaes showing sales and profits of these witnesses (R.12-17) were never even offered in evidence by the government despite waiver of any objection as to their authenticity or genuineness by the defense (R.110). Certainly this Court should not be burdened with considering these unsubstantiated assertions of counsel based upon unimportant or unreliable information.

B. Applicant's theories are unsound in law and economics. The economic and legal theories which appear to emerge from the applicant's consideration of the history and growth of the beer industry (A.B.9-14, 20-24) are contrary to the basic tenets of all the antitrust laws including Section 7 of the Clayton Act. It is competition, not competitors, which Section 7 and the other antitrust

laws are designed to foster and protect. *Brown Shoe Co. v. United States,* 370 U.S. 294, 344 (1962). Yet, applicant here, while admitting that its members are "of their very nature, unable to operate as efficiently as the large brewers," (A.B.22), nevertheless complains that the growth of the beer industry from a large number of local monopolies into an ever expanding market area of effective competition (A.B.13) with more and more competitors (A.B.10-11) has resulted in the elimination of some inefficient small brewers. These brewers, applicant says, lacked the "foresight and resources" of others who "began expanding their markets outside their customary geographical area by shipping keg beer, or packaged beer to distant markets" (A.B.10) when the advent of such things as improved refrigerated transportation, hard roads, pasteurized beer, and new techniques in packages and packaging brought competition into all these local beer monopolies throughout the country. What applicant decries is not the merger of Pabst and Blatz, but the steady economic progress and growth of the beer industry. Protection is requested for its members not from mergers, but from competition, a request clearly repugnant to the avowed purpose of all antitrust laws.

While applicant professes that it does not seek to penalize efficiency, the startling statement is made at page 23 of its brief that "*the efficient Brewer who has been able to extend his operations . . . should not be allowed to minimize the extent of his injury to competition through his efficient operations . . . .*" Pabst submits that no theory of law or economics permits an inference that efficiency will injure competition, but on the contrary that the continued struggle for greater and greater efficiency, for the ability to produce and deliver better and better

goods to the consumers at lower and lower prices constitutes the lifeblood of competition. Applicant's theory of competition would turn back the clock to the days of the local monopolist; it seeks the subsidization of inefficient competitors at the expense of true competition and the public. The absurdities of applicant's theories demonstrate the wisdom of confining appellate consideration to matters of record below where they can be screened and tested under the prescribed methods of the judicial process.

C. The extra-record material offered by applicant is irrelevant, incomplete and unreliable. Exhibits 2 through 13 attached to the applicant's brief purport to be sales figures for individual brewers in the United States as a whole (Exhibits 2-5) in Wisconsin (6-9) and in Michigan (10-13) for the years 1962 through 1965. As noted above, by agreed pretrial order all evidence below was limited to acts and events prior to December 31, 1961 (R.114) and the government completed its case on January 28, 1964 (F.12, R.460). Consequently none of this 1962-1965 material was available to the trial court, is not in the record, and should not be considered by the Court in exercising its appellate function.

In addition to being outside the record, there are other obvious irrelevancies of this material. No claim has ever been made that the state of Michigan or the state of Illinois constitutes a separate geographic market. Information concerning them is only relevant as it may relate to the entire alleged three-state area of Wisconsin, Illinois, and Michigan. But no statistics at all are included for Illinois (A.B.8), so that no conclusions could be validly drawn concerning this alleged three-state area. Arguments concerning the alleged competitive situation in the individual

states of Michigan (A.B.8, 31-34) and Illinois (A.B.8, 34) are thus irrelevant.

Apart from irrelevancies, applicant's failure to include information of any sort concerning 25% of Wisconsin sales by 25 brewers located outside of Wisconsin is a shocking omission of material facts. Three of those brewers, Hamm's, Anheuser-Busch, and Drewry's, ranked second, sixth and eighth in beer sales in Wisconsin in 1961. (G.B. App. B, R. 216). Yet, applicant ignores all these important brewers in discussing the manner in which "The Acquisition Has Particularly Affected the Status of the Competition in Wisconsin" (A.B.26-30).

In addition to the mistaken and misleading assertions concerning the tabulation on page 27 which were discussed in the Statement (*supra,* p. 5), the following additional examples of such assertions contained in this Wisconsin section of the brief demonstrate its unreliability and constitute additional reasons for denial of leave to file:

1. At page 28, applicant states that for the year 1962 there were 29 brewing companies "operating within the state of Wisconsin." However, in the year 1961, the government's evidence shows that there were 54 brewing companies selling beer in Wisconsin (G.B.4). Applicant's repeated use of these words "operating within" for each of the years 1963 through 1965 (A.B. 28-30) constitutes a deliberate attempt to mislead the court by understating the number of brewers selling and competing within that state.

2. On page 28 it is said that "the largest sellers of beer within Wisconsin for 1962 were the Pabst Brewing Company, the Schlitz Brewing Company, and

the Miller Brewing Company." Applicant's Exhibit 6 shows on its face that Heileman Brewing Company sold 285,697 barrels of beer in Wisconsin in 1962 compared with Miller's 144,691. Although not in the record, Gettelman was acquired by Miller in January, 1961 according to the government (G.B. Appendix B), but even their combined sales on Exhibit 6 of 255,927 barrels were still less than Heileman's. In addition, the government evidence showed that in 1961 Hamm's Brewing Company sold 120,000 barrels more in Wisconsin than did Miller-Gettelman so that there were at least four and perhaps five brewers whose sales were larger than those of the company designated as third by applicant in its brief.

3. The brief asserts that the out-of-state beer sales of Pabst, Schlitz and Miller "makes no difference" to other Wisconsin breweries and that these out-of-state sales have no bearing on these companies' intrastate sales (A.B.28-29). The thesis is implausible enough to be almost facetious. No brewer is willing to disregard, as suggested by applicant, the sales of his product in one area, nor is the small brewer who may choose to sell only in Wisconsin unconcerned with what may be happening in other areas with respect to his other Wisconsin competitors who choose to sell in both places. A brewer's reaction to competitive situations outside a state cannot help but affect his reaction to competitive situations within a state. Interplay of supply and demand for beer is admitted by applicant to have crossed state lines and resulted in increased areas of effective competition in the beer industry since repeal of prohibition (A.B.13). No longer can any brewer operate his own little monopoly insulated from competitive factors which apply throughout the nation.

Extended citations of similar errors, misclassifications, and misinterpretations throughout applicant's brief would unduly prolong this memorandum. Suffice it to point out here that, contrary to applicant's assertions, there have not been nine small brewers who failed in Illinois between 1957 and 1966 (A.B.34), certain small brewers have been very successful in the past five years (A.B.6) and the Pabst-Blatz increase in sales has not brought about the diminishing share of local brewers in Wisconsin sales (A.B. 8-27).

Pabst submits that the foregoing examples demonstrate that the alleged factual material in applicant's brief is not only irrelevant but is unreliable. The brief serves no purpose in determining the issues of this appeal and the motion for leave to file it should be denied.

CONCLUSION.

Because applicant's motion for leave to file a brief as *amicus curiae* in support of the government was not timely presented to the Court, nor in accordance with the other requirements of this Court's Rule 42, and because the brief would serve no useful purpose in determining the issues of this appeal, the motion should be denied. The brief submitted with the motion contains almost exclusively alleged factual material which was not presented to the trial court; the allegations, arguments and theories of applicant's counsel contained therein have been shown

to be irrelevant, incomplete, inaccurate and misleading. Irrespective of the deficiencies in the motion for leave to file, the brief does not merit the consideration of this Court in determining the issue presented by this appeal.

Respectfully submitted,

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